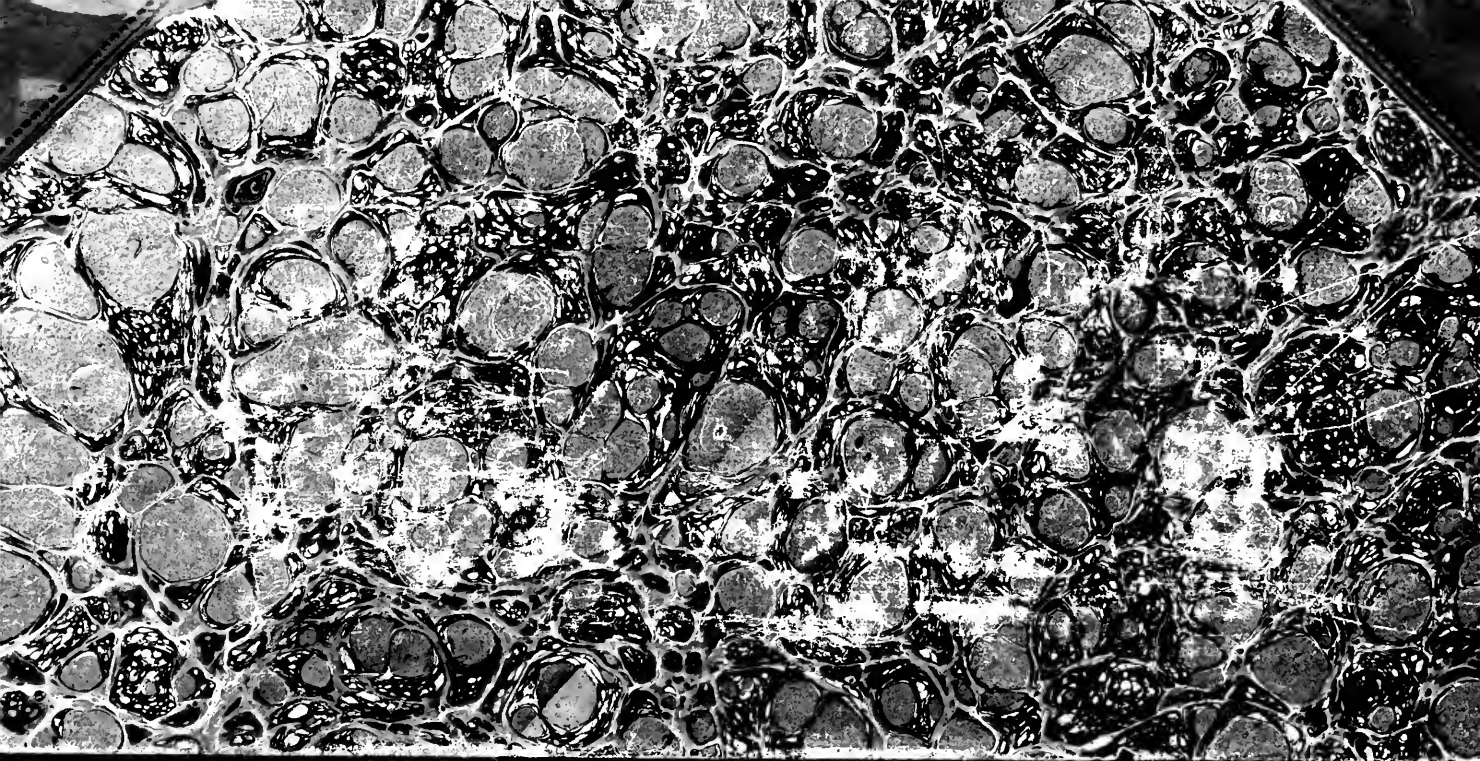

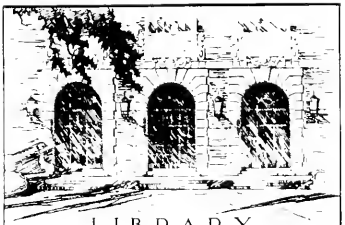

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REMARKS

ON

SOME LATE DECISIONS

RESPECTING

THE COLONIAL CHURCH.

BY

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Remarks on some Late Decisions respecting the Colonial Church.

PROBABLY I am not the only person who has found it difficult to understand clearly the combined effect of some late decisions on the Colonial Episcopate and the Colonial Church. When such a difficulty occurs, the first thing to be done is to make out as exactly as may be the meaning of the words which we employ, and reduce to as much certainty as they will bear the legal conceptions with which we have to deal. Having tried to do this in the present case for my own satisfaction, I am tempted to print what I have written, for the use of others who may share my difficulty and into whose hands this paper may fall. Such a process is almost inevitably dry and tiresome, and this paper will be dry and tiresome. But it will, at any rate, be short. It has no pretensions to be an examination of the three judgments in question; it is merely an attempt to bring into a stronger light some points which I conceive to be involved in them. If, where great authorities have spoken, I express an opinion of my own, I do so respectfully, as one of the public, on a matter which has been thrown open for discussion.

"Long *v.* Bishop of Capetown."

1. The substantial point decided by the Judicial Committee of the Privy Council in the appeal case of "Long *v.* the Bishop of Capetown," was, that persons calling themselves members of the Church of England in the Cape Colony stand,

in the eye of the law, on precisely the same footing as a voluntary religious association (such as a Dissenting community) stands on here. To the apprehension of a lawyer this is clear and satisfactory, so far as it goes. The principle on which the Court of Chancery acts when called on to deal with a dispute among the members of a Nonconformist body is settled by a line of decisions: the only difficulty which might be anticipated lies in applying the principle to the facts.

Bishop Gray had in that case assumed to deprive a clergyman of his spiritual charge, which carried with it the right to officiate in a particular church and receive the income of a trust-fund appropriated to the support of that church. It was conceded that by the terms of the trust, coupled with Mr. Long's own acts, the Bishop was authorized to do this for any cause which would have warranted the deprivation of a beneficed clergyman in England; but it was held that Mr. Long's offence was not such a cause.

2. In "the matter of the Bishop of Natal" the Ju-

"In the matter of the Bishop of Natal."

dicial Committee held that Bishop Gray did not stand to Bishop Colenso in the relation of Metropolitan to Suffragan, and had not authority to deprive or depose him. The decision, however, was much more extensive than this. For the Committee excluded from consideration both the nature of a Metropolitan's powers (which had been chiefly discussed in argument), and the alleged cause of deprivation, and founded their conclusion on the broad ground that no power to deprive for an ecclesiastical offence could exist except by grant of the Crown, and that no such power could be granted by the Crown to be exercised in a colony possessing, at the time of the grant, an in-

dependent Legislature. The judgment contains the following passages:—

"After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom. It may be true that the Crown, as legal head of the Church, has a right to command the consecration of a Bishop; but it has no power to assign him any diocese, or give him any sphere of action, within the United Kingdom. The United Church of England and Ireland is not a part of the constitution in any colonial settlement."

"Pastoral or spiritual authority may be incidental to the office of Bishop; but all jurisdiction in the Church, where it can be lawfully conferred, must proceed from the Crown, and be exercised as the law directs; and suspension or privation of office is matter of coercive legal jurisdiction, and not of mere spiritual authority."

Doubts, not wholly unreasonable, may, I conceive, be suggested as to the exact force and extent of this decision. The force of a decision depends on the jurisdiction of the Court; the extent of it depends, not on the language employed, but on the question presented for adjudication. No Court can decide a question not brought before it; nor can language the most laboriously positive transform a *dictum* into anything more than an expression of opinion. The question submitted by Dr. Colenso to Her Majesty in Council was, whether Dr. Gray had, or had not, authority to deprive him. Authority to deprive may exist (*a*) by law; (*b*) by virtue of a contract previously entered into by the person deprived; (*c*) by the terms of a trust, of which the person deprived claims the benefit. Whether, in adjudicating on the petition, Her Majesty in Council assumed jurisdiction as

supreme ecclesiastical judge, or as a civil judge authorized to interpret her own Letters Patent, and to determine on their validity, I do not clearly understand: but, whatever jurisdiction she might be supposed to have in either of these characters, she could, I conceive, have none to decide any question but this—whether the sentence of deprivation was, or was not, a *legal* sentence—a sentence warranted (that is) by ecclesiastical law, or warranted by the Letters Patent. Whether it could be supported on the ground of contract or trust, could not be decided one way or another, except by the civil tribunals having jurisdiction in litigated questions of property or civil rights dependent on contract or trust: and the Queen in Council does not, as far as I am aware, constitute one of those tribunals, except when she receives appeals from civil courts in the colonies.

Be this, however, as it may, the judgment was commonly understood to establish that there were no Bishop and diocese of Natal known to the law.

"Bishop of Natal v. Gladstone and others, Trustees of the Colonial Bishopries Fund."

3. It has now been held by the Master of the Rolls, that there are a Bishop and a diocese of Natal known to the law, and within the meaning of the founders of the Colonial Bishopries Fund; and, as a part of the ground of that decision, it has been held, or asserted, that the Bishop of Natal has jurisdiction even to deprive a clergyman officiating in the diocese of Natal for sufficient cause. It was asserted with reason as a ground of the decision; for what sort of a diocesan would he be who had no jurisdiction at all? This judgment appears to be at variance with that of the Judicial Committee "in the matter of the Bishop of

Natal," unless it be true that the word jurisdiction, or the phrase "authority to deprive," is used by the Judicial Committee in one sense, and by the Master of the Rolls in another. Beyond this, there are in the two judgments *dicta* which, taken in their plain grammatical sense, seem to militate against each other, and can with difficulty, I venture to say, be reduced, or tortured, into harmony by the most skilful master of language.

The Master of the Rolls's judgment contains the following passages :—

"It would be erroneous to say that the Crown can create no See or Diocese within such a colony as Natal, or Capetown."

"It is not declared by the judgment of the Privy Council that the Bishop of Capetown has no effective ecclesiastical jurisdiction, unless in the word 'effective' is included the word 'irresponsible.'

"The Bishop of Capetown, the Bishop of Natal, the bishops of all colonies similarly circumstanced—i.e. having an established Legislature, but no established Church—can, as regards the ministers and congregations of the Church of England within their diocese, exercise all the powers of a bishop; they can ordain, confirm, and consecrate; they can do more; they can visit, investigate, reprove, suspend, and deprive; and if, in so doing, they keep within the due scope of their authority, as established by the discipline of the Church of England as by law established, and proceed in the exercise of that authority in a manner consonant with the principles of justice, their acts are valid, and will be enforced by the legal tribunals.

"The district or colony of Natal is a district presided over by a bishop of the Church of England, which is properly termed a see or diocese; the ministers, deacons, and priests, officiating within that district, and also all the laymen professing to be members of the Church of England, constitute not a Church in Natal in union and full communion with

the Church of England, but a part of the Church of England itself; and all the ministers, priests, and deacons, there officiating, and all the persons composing the several flocks, are members and brethren of the Church of England in the strict sense of the term."

Upon these decisions I defy anybody to say for certain whether there is, or is not, a Bishop and a diocese of Natal. And this uncertainty affects in an equal degree nine at least of our Colonial Bishopries, and throws doubt, according to a careful estimate, on twenty-five. It affects, not merely the position of the Bishops themselves, but a multitude of transactions, which have proceeded on the assumption that they had a diocesan character; and it may possibly raise a question whether persons ordained by them are, or ever could be, capable of receiving preferment, or even ministering in England.

I.

Meaning of the word "Voluntary."

What do we mean when we speak of a "voluntary" religious society, as distinguished from a religious society established by law? We do not mean by it a society to which a man may belong or refuse to belong at his pleasure: if we did, the Established Church in England would be a voluntary society, for even in England no subject of the realm is under any legal obligation to belong to the Established Church. Nonconformity is recognised by the law as a fact, and is not prohibited. Nor do we mean the absence of endowments, or of political power, or of external dignities, or of internal discipline, or of doctrinal standards, or of formularies; for of these things some are plainly unimportant, and others are possessed in a greater

or less degree by most of the bodies which we call "voluntary" or unestablished. What we do mean, as a little reflection will shew, is this—that the rules of an established society are part of the law of the land, and enforced as such; whilst the rules of a voluntary society are not part of the law of the land, and are not enforced as such. When the members, or any of the members, of a religious society have, as such, special rights and obligations, capacities or incapacities, created by the law of the land—when, in two words, they have a legal *status*—the society is established: they have none when it is not established. A parish clerk has, as parish clerk, a legal *status:* the President of the Wesleyan Conference, or of the General Assembly of the Free Church of Scotland, the Primus of the Scottish Episcopalian Church, a Roman Catholic Bishop of Glasgow, have, as such, no legal *status*. If the law of the United Kingdom were to cease to regulate the rights and duties of members of the Established Churches of England and Scotland, these bodies would become voluntary societies. If it undertook to regulate those of members of the Free Church of Scotland, that body would cease to be a voluntary society.

It is evident from this that a religious society may be only partially established, and that different religious societies may be established, not only in different parts of the same kingdom, (as is the case in England and Scotland,) but in the same place at the same time. There is no logical reason, for instance, why particular legal rights, such as that of holding property as corporations or *quasi*-corporations, should not be granted in the French Empire to Protestant Consistories, or in a British colony to office-holders of

a dozen different religious denominations. In so far as a religious society possessed such legal rights, it would be established; though, if it had them to a very limited extent, we should not call it so, because this would not be its predominant character.

An Established Church is a political society.

It is evident further, that, so far as a religious society is held together by the law of the land, it is not properly a religious, but a political, society. What is a political society? It is a number of persons held together, or made a society, by subjection to a sovereign authority, whose permanent commands are municipal law. What is a religious society? That is a notion less easy to define: it includes, at any rate, some or all of these things,—the acceptance of a common creed, common rules, a common organization, the habit of acting together for common objects; the creed, the objects, the sanctions which support the rules,—in a word, the ties which bind the society together, — being religious. Whatever more than this the idea of his Church, for example, presents to the mind of a religious man, is matter of belief, or sentiment, or opinion, and does not enter into the definition of a religious society in general. The Churches of England and Scotland by law established are, as such, political societies. French writers commonly, and some persons amongst ourselves, regard the Established Church in England as a society merely political; so that, if the whole body of ecclesiastical law, as it is called, (that is, the laws of the land in reference to the Church,) were repealed to-morrow, the Church itself would cease to exist. It would necessarily cease to exist as a political society. But there is also in England, under the name of the Established Church (whether

co-extensive or not with the Establishment itself, according to any legal definition which could possibly be assigned to it), what substantially answers to the conception of a religious society; and this religious society would not, in the supposed case, necessarily or probably cease to exist, though the sudden removal of those legal sanctions on which it has for centuries relied, and which have in practice gradually eclipsed and partially superseded the sanctions of conscience and religion, would be a shock of the severest kind.

The expression that the Colonial Church is a "part" of the Established Church not legally correct.

To speak, then, of inhabitants of a colony where there is no established Church as being members, or forming part, of the established Church of England and Ireland, is nonsense, if we use that phrase in its literal acceptation as meaning the political society constituted under that name by law in England and Ireland. Where they live, the laws which make that society do not exist, and the society itself therefore can have no existence. To use this expression, therefore, is to affirm, what some deny, that there is, under that name, a religious society as well as a political one; and it really amounts to no more than an assertion that there are in the colony persons accepting the same religious beliefs, the same forms of worship, and, so far as may be, the same or a like religious organization as are accepted by the persons composing that religious society in England. I do not see what else it can mean; nor, although persons calling themselves members of the English Church in Natal may have an organization exactly similar to that of the English Church in England, as well as derived originally from the same sources,

do I see that they could be said to have one which is common, or the same. A Wesleyan in Natal is probably liable to be censured or expelled from communion by the very same persons who would censure or expel, for like cause, a Wesleyan in England; just as a Presbyterian minister in Lancashire is, or was, liable to be cited before a Presbytery in Edinburgh, and to be declared out of communion by a General Assembly in Scotland. But in the English Church jurisdiction is diocesan and provincial; and a Churchman in Natal, even ordained and with cure of souls, is not subject to the same jurisdiction as if he were in London or York. Not even when he reaches the last appeal open to him does he find himself before the same Court. For nobody, I suppose, will contend (though I am here partly anticipating what I shall have to say by-and-by)—nobody will seriously contend that an appeal would lie from a sentence of deprivation by a Bishop of Natal or any Bishop similarly situated to the Queen in Council, or will confuse with such a proceeding an appeal from a civil tribunal, like that prosecuted by Mr. Long. In the former case there would be, in the eye of the law, no Court, no cause, no judgment, and therefore no appeal: in the latter, the appeal is not from the Bishop's judgment, nor to the Crown as an ecclesiastical judge. It is not then, I conceive, strictly accurate to say that inhabitants of a colony, who may call themselves members of the Church of England, or of the United Church of England and Ireland, are bound by the tenets and discipline of that Church by reason of their being actually a portion of it. They incur, in fact, by calling themselves so, no legal obligations which they would not have incurred

had they called themselves members of the Church of South Africa. The difference is, that the one description implies the acceptance of tenets and rules which are known, and the other of tenets and rules which are not known; and that, if the question what their tenets and rules were should be raised incidentally in a civil Court, it would be unnecessary in the one case to produce evidence which would be necessary in the other.

Doctrinal standards of Colonial Church.

Every religious society properly so called—that is, every number of persons having not only common religious beliefs, but some common religious organization—has certain selected tenets (not necessarily the most important in the opinion of all its members) which it regards as tests of agreement with itself, or as terms of communion. The Articles and Formularies are in England made by law the standards, to a certain extent, of faith and public teaching for clergymen of the Established Church, and we have accepted them as such. The Apostles' Creed is, in the Baptismal Service and the Service for the Visitation of the Sick, treated as comprising the terms of communion. A judge, who had to enquire what were the tenets and discipline of an unestablished society calling themselves members of the Church of England, would be justified in assuming that these standards occupied among them a position analogous to that which the same standards hold among ourselves.

II.

Meaning of "Jurisdiction."

The word jurisdiction occurs so often, and plays so important a part in these questions, that it is worth while to make sure of its meaning. The first rule of sound reasoning is to use the same

word in the same sense throughout the same train of argument, or, whenever it bears a new sense, to mark the difference clearly. Loosely, we speak of jurisdiction as synonymous with authority to command. More accurately, it means authority to pronounce a judicial sentence. By a sentence I mean, not a mere opinion on a disputed question, which may be disregarded at pleasure, but a declaration or order carrying with it some obligation to obedience. If by disobedience I expose myself to some legal sanction—to be imprisoned for contempt of court, or to have my goods seized by the sheriff—that is a legal obligation; if to some evil not imposed by law, such as the expulsion from a club to which I like to belong, there is a force analogous to, but not identical with, a legal obligation; if only to my own self-reproach, nothing but what we call a moral obligation remains. The meaning of jurisdiction, then, is not limited by adding to it the word "coercive," since all jurisdiction must be coercive in one way or another. Jurisdiction may exist in a religious society, as well as in a political one; excommunication may to some men be a more dreadful penalty than fine or imprisonment is to others; and jurisdiction in some shape does exist in most religious societies. But where a religious society has been taken under the tutelage of the State, the jurisdiction which it would have exercised over its members is apt to become merged, and the sanctions appropriate to that jurisdiction lost, in those which the State supplies.

"Legal" Jurisdiction. Two senses.

Jurisdiction is necessarily "coercive," but it is not necessarily "legal;" and it may be legal in a primary, or in a secondary, sense. An arbitrator appointed under a deed or agreement

has jurisdiction which can be called legal only in a secondary sense. The law will enforce the arbitrator's award, if properly made. But the arbitrator is not appointed, directly or indirectly, by the Sovereign to declare the law; his award is not an authoritative declaration of the law; it is binding only on the parties, incorporating itself in fact with the original agreement, and, as a part of that agreement, standing or falling with it; the legal force which it possesses it obtains only from the general law which secures the observance of contracts. But the Sovereign himself speaks through the mouth of a Judge, and arms him with all the sanctions of the law.

Jurisdiction within a voluntary society.

The jurisdiction exercised within a voluntary religious society is, like that of an arbitrator, founded on compact; and it is therefore not a legal jurisdiction in the primary and ordinary sense of the phrase. A sentence of deprivation pronounced by the Wesleyan Conference, by the General Assembly of the Free Church of Scotland, by a Bishop of the Scottish Episcopal Church, by a Colonial Bishop in a colony where the Church is not established, is an act which may, if it follows the compact which gives the jurisdiction, have legal consequences; for it may work the exclusion of the deprived person from the benefit of an endowment or the use of a place of common worship. But it is not a legal sentence, because it is not the sentence of a judge authorized to declare the law.

Jurisdiction of Ecclesiastical Courts.

The jurisdiction, on the other hand, of an Ecclesiastical Court in England is as strictly a legal jurisdiction as that of the Queen's Bench. The Judge, be he Archbishop or Bishop, or the judicial officer of an Archbishop or Bishop, sits

under the authority of the Sovereign; under that authority he declares and applies a portion of the law of the land; and he is armed for that purpose with legal sanctions, which may be effective like deprivation, or ineffective like excommunication in such a community as ours. Such an expedient as the *significavit* was but a roundabout way of eking out the powers of one legal tribunal by the machinery of another. A penalty exactly the same in substance—deprivation—may be inflicted by the Court of Chancery upon a minister of a Presbyterian congregation who forsakes the doctrines of Presbyterianism, and by the Court of Arches upon a clergyman of the Established Church who "depraves" the Book of Common Prayer. But observe the difference. In the latter case, there is an offence and a punishment—an evil (that is) inflicted by public authority for a public purpose: in the former, there is neither punishment nor offence; there is a private injury, and a redress of it by civil process. In the one case, the law violated is a command, regulating directly and of set purpose the public teaching of religion: in the other, it is only the general rule that property which is held in trust be applied in accordance with the trust. A contract for the sale of a coal-shed, and one which implicitly embodies the whole discipline and teaching of a great religious denomination, are enforced in Chancery on precisely the same grounds, and with the same serene indifference to the nature of the matter in hand. In short, rightly or wrongly, the law declares the teaching of the Established Church to be a matter of public concern, and that of every other religious body whatsoever to be a matter of private concern. It directly regulates the first; it

refuses to take any notice, otherwise than incidentally, of the second.

Unless this cardinal distinction is kept clearly in view, the whole subject is lost in obscurity and confusion.

III.

Application of previous remarks.

Let us apply the notions we have gained to the case of a colony where the Church is not established, and where the Crown possesses no power of legislation. What is the legal *status* of a Bishop in such a colony? None. What legal jurisdiction has he as a Bishop? None. What legal jurisdiction is he as a Bishop subject to? None. What legal authority or supremacy can he, as Bishop, exercise over others, or can anyone else, from the Queen downwards, exercise over him? None. What power has the Crown to clothe him with a legal *status?* None. A new legal *status* means a new set of legal rights and obligations: to create new legal rights and obligations is to make new laws, which the Crown, by hypothesis, has no power to do. The legal control of the Crown over him vanishes of necessity together with his legal control over his clergy. That a legal supremacy in matters ecclesiastical has no existence in such a colony is a plain corollary of the proposition that the colony has no Established Church. The Supremacy is a part of the law of the Established Church, and in such a colony the Established Church is, as has been justly said, not a part of the Constitution. Plain as all this is, there is an evident reluctance to recognise it fully, at which we can hardly wonder, when we consider what it involves. But, whatever it may involve, it is true.

It is at the same time true that a Bishop, though in the eye of the law a mere private gentleman owing to

courtesy any title or precedence which may be accorded to him, may yet in fact exercise important functions, and wield considerable powers. He may do this by appealing to the religious sentiments and convictions of the members of his communion; he may do it also as being himself the object of a trust, or as the person to whom, under a trust or compact, obedience is due as a condition attached to the enjoyment of a stipend, or the right to officiate in a church. And his authority in cases of the latter kind will be upheld, as an integral part of the trust or compact, by the civil Courts, which all the while regard him personally as a mere private man. As a Bishop, he is nothing to them; the law they administer knows nothing of Bishops. It appears to be held by some that a right to appoint and to control persons whose situation is to be such as I have described, is among the prerogatives of the Crown. The Master of the Rolls stigmatizes with severity from the Bench those who would "elevate the Church over the throne, or depose the Sovereign from being the Head of the Church in the colonies dependent on her." It seems also to be supposed that this power of appointment and control on the part of the Crown must be deemed an element in the trust or contract among members of the voluntary society itself, as being a fundamental tenet of the English Church. The declaration in the Thirty-Seventh Article that "the Queen's Majesty hath the chief power in this realm of England and other her dominions, unto whom the chief government of all estates of this Realm, whether they be ecclesiastical or civil, in all causes doth appertain, and is not nor ought to be subject to any foreign jurisdiction," is construed by Lord Romilly into an assertion of such a tenet.

1. There is, I hope, no disloyalty (we do not live under the Stuarts) in temperately inquiring whether a supposed prerogative really exists, especially a prerogative of so singular a nature; nor yet in asking whether such an office as either of these theories would ascribe to the Crown is consistent with its dignity, or with its constitutional functions and position. I shall not enter into the general question of the Supremacy, the true meaning of the Thirty-Seventh Article, or the proper application of it to a British colony in the nineteenth century, where there is no Established Church, are no ecclesiastical Courts, and can be no "ecclesiastical causes," and where all denominations are on an equal footing. But I think it not disrespectful to observe—

First, that legal language on this subject, borrowed as it is in great measure from Tudor precedents and Tudor legislation, is apt to be somewhat loose and inflated, and requires, before you reason on it, to be carefully reduced to its precise legal value;

Secondly, that the Royal Supremacy is only a collective name for a group of legal powers and attributes in relation to the Established Church—powers and attributes which form part of the prerogative, itself part of the law of the land;

Thirdly, that these powers and attributes, being created by law, are circumscribed by law, and can be exercised only in ways marked out by law;

Fourthly, that the powers of appointing and depriving Bishops and of assigning dioceses to them would not, for the reasons stated above, be *legal* powers within a colony such as I have been referring to. The right to exert such powers therefore in relation to such a colony cannot be part of the prerogative of the Crown.

2. Again it is to be observed that an appointment made by the Sovereign by virtue of a trust or of a compact among private individuals would not be made by her as Sovereign, but as a person designated under that description; just as an appointment similarly made by the Lord Chancellor would not be made by him as Chancellor, but as a person so designated. But it is surely needless to add, that neither the British Constitution nor the theological standards of the Established Church contemplate any action by the Sovereign upon or towards the Church except in the character of Sovereign and by virtue of law. If, therefore, the Thirty-Seventh Article have the force which Lord Romilly assigns to it, what follows? It follows that the English Church, as a religious society, cannot possibly exist in such a colony as Natal. It follows that no religious society in such a colony can possibly hold the tenets of the English Church[a].

I do not propose to travel into the question further, or to pursue the propositions which I have ventured to assert to their logical or practical consequences. One word, however, as to the future. Of the dangers, vividly stated by the Master of the Rolls, to which small and scattered religious bodies may be exposed by the want of a common authority on disputed points of faith and discipline, every thoughtful person must be keenly sensible; though it may, I think, be doubted whether the real risks are quite as great, and whether they are as unmixed an evil, as the habits of a lawyer, and still more those of a Judge, would dispose him to believe, and whether the one sole and appropriate instrument for counteracting them is a central Court of law sitting in London. On this subject—on the real nature and unity of that great and widely-scattered

[a] See note, p. 22.

society which we call the Church of God, and its real claims on the heart and conscience—on the question whether it is intrinsically desirable that the organization of a Church should be vigorous and firmly strung, or lax and pliant—on these and other questions lying outside the range of the foregoing remarks every man has a right to his own opinions, and I have mine. It is in the power of Parliament—it is within the competence of Colonial Legislatures—to remove some existing doubts, to give to the Crown powers which it does not now possess, to create new legal relations between the State and religion, such as we have not seen before. But I am strongly persuaded that, whatever we may think or desire, whatever troubles and difficulties the Colonial Church may have to encounter in time to come, whatever theories may be spun, or expedients imagined, neither judgments of Courts, nor acts of local Legislatures, nor statutes of the Imperial Parliament, can establish or perpetuate in the colonies an ecclesiastical supremacy of the Crown over a single denomination; and I should see with regret endeavours in this direction, which must, as I think, in the long run multiply embarrassments, and could only end in failure. The view on which the Colonial Office has acted during a long course of years, in respect of Episcopal appointments, was supported originally by the authority of some of the greatest English lawyers, and has received a kind of implicit sanction from several Parliaments; but it has broken down at last, when judicially tested, in a Court of law, and it would certainly, sooner or later, have broken down in practice. The principle that the Church in the Colonies is a voluntary society must be recognised frankly and thoroughly, by the law and by Churchmen themselves; and what-

ever we do must be based on it, if we wish that what we do shall last.

NOTE ON p. 20.

The word "Sovereign," when applied to a King or Queen of England, is used of course in a popular, and not in a strict, sense—as a title, and not as a precise description of the powers really possessed by the wearer of it. The same observation applies to the words "supremacy" and "supreme," which indeed differ from "sovereignty" and "sovereign" only as being different forms of the same word. The King of England has not the power of imposing his own will as law (which is the criterion of Sovereignty) in ecclesiastical affairs, any more than in affairs not ecclesiastical; that power resides, not in him, but in a body of which he forms a part or member. As King, he is entrusted by the law with special powers, and clothed with special attributes, collectively called his Prerogative, in relation to foreign affairs, to war, to trade and navigation, to the judicature, and other things—amongst the rest, to the Church by law established. The powers entrusted to the Crown in relation to the Established Church, collectively called the Supremacy, are a part, or have been affirmed to be so, of its old common-law prerogative, declared and re-asserted, without being precisely defined, by the Statutes of Henry VIII. and Elizabeth. They are not very extensive, consisting mainly of the power to nominate Bishops and that of permitting and controlling, in modes pointed out by law, the action of Synods and Convocations. Judicially, the King in Council is the highest Court for ecclesiastical appeals as he is for certain classes of appeals in civil cases, and as the House of Lords is for other appeals: the Court in each case is a Court of law, created and regulated by law; and for personal "supremacy,"—for any personal action on the part of the Crown, —there is no more room in ecclesiastical suits than in suits of any other kind. It may be added that as the powers of the Crown in reference to trade, navigation, the coinage, and the like, have been limited and moulded by various Statutes, and the exercise of them parcelled out among different administrative departments, so the ecclesiastical prerogative has been operated upon by the Ecclesiastical Commission Acts, and the Acts constituting and regulating the Judicial Committee.

A vague metaphorical title like that of Head of the Church, or a somewhat exacter title like that of Supreme Governor, is nothing in itself; it simply denotes certain legal powers and attributes in relation to the Establishment, which are neither more nor less liable to be extended by way of inference or analogy than the powers lodged in the Crown with reference to war or trade. If it be suggested, for instance, that the Crown has power to command the Archbishop of Canterbury to consecrate a Bishop to whom no see is assigned, that is a power the existence of which must be proved like that of any other alleged power. That the Supremacy should have worn, so to speak, a more personal aspect—that we should have

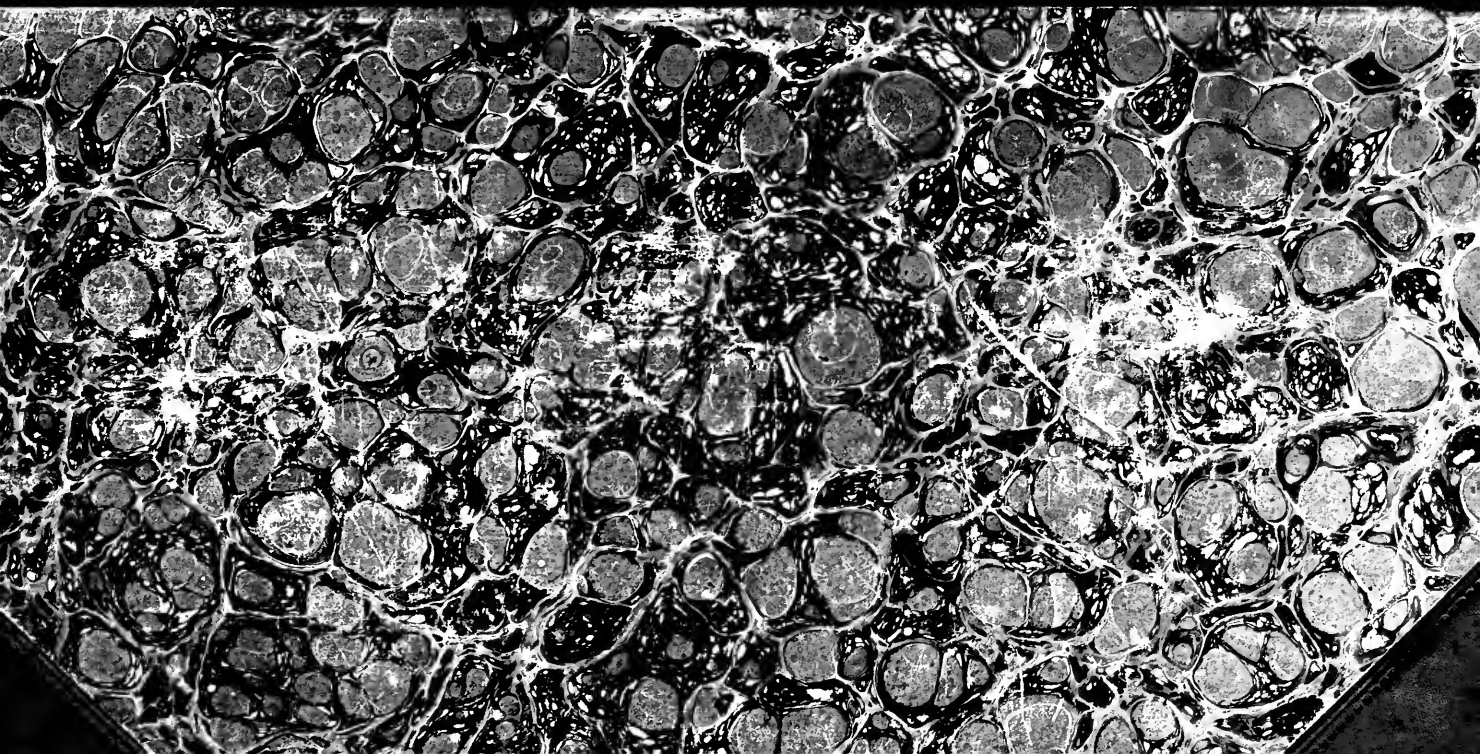
been accustomed to think of it as more closely attached to the person of the Monarch—than other prerogatives, is natural and intelligible. It resembles other common-law prerogatives in having descended originally from times when the King was really sovereign, controlled only by irregular, though powerful, influences, and approached only in the way of petition and advice. But it connects itself, more sensibly than any other, with the traditions of the Roman Empire, the source whence Royalty, in mediæval and in modern Europe, has largely drawn its majestic titles and lofty personal attributes; it was asserted by the Tudor Parliaments with a vehemence of expression and an almost extravagant amplitude of language, inspired, if not warranted, by the object they had in view, the utter demolition of the dominion of the Popes; it was exercised, during the great religious revolution which we call the Reformation, with somewhat of the rough, unscrupulous vigour with which power is wielded in revolutionary times; and Churchmen themselves have since that period, from tradition, from sentiment, and partly, too, from policy, been disposed to cling to the notion of an inherent personal supremacy in the Crown as more becoming in theory and less formidable in practice to religion than the paramount supremacy of Parliament. Yet it is as certain as anything can be that the Supremacy is the creature of Constitutional Law in England, and that Parliament could, if so minded, abolish it to-morrow. If it were abolished, the Church as a religious society would still hold the general duty of obedience to the civil magistrate in temporal matters, and the lawfulness *in foro conscientiæ* of submitting to him in what are called "mixed" matters. And this is what the Colonial Churches hold in colonies where the supremacy is not established by law.

It is quite possible, of course, for this portion of the law of England to be law in a colony. By virtue of Imperial or colonial enactments, of Crown legislation, or of what may be called the original common-law of the colony—Dutch law in Natal, English in New Zealand, Spanish in Trinidad, the *Coutume de Paris* in Lower Canada, the *Code Civil* in the Mauritius—a special supremacy of the Crown in respect of a particular denomination may be a part of the code administered in the colonial Courts. Where it is not so, the Crown may introduce it, but only if the colony be one in which the Crown originally had legislative powers, and has not relinquished them by the creation of a colonial legislature. Where it does exist, the denomination in question would, to that extent, be an established, and not a voluntary, society. These are plain propositions, which I reiterate only because it is so necessary to look them fairly in the face. But it would surely be an absurd proposition to say, that the Crown can have legal jurisdiction over a Bishop, as such, in a place where a Bishop, as such, is an officer unknown to the law.

The power of appointing a Bishop stands, of course, on wholly different ground from that of appointing those civil officers who are necessary for the transaction of public business and the administration of justice in a colony, and whom the Crown, as head of the

executive government throughout the Empire, is authorized to appoint by warrant wherever their services are required. A Bishop, unless he be a Bishop of a Church by law established, is no more a public functionary than a Baptist minister is; and he is not a public functionary within a colony unless the Church be established by law within the colony. A minister sent out by the Scottish Establishment, and a Bishop, priest, or deacon sent out by the English Establishment, are alike destitute of any public character or office, if neither of those religious societies be an establishment in the place to which they go.

It need hardly be added that the laws by virtue of which a Bishop is a public functionary in England—belonging as they do to the domain of public, and not to that of private law, and resting upon circumstances which exist in England, but do not travel abroad with Englishmen—are not among those laws which British settlers in an unoccupied country take with them to their new home. The principle is stated by Mr. Westlake (*Private International Law*, p. 137)—

"The settlers take with them all those laws which concern private rights between man and man, and the colonial tribunals must enforce them; for such laws were common to the parties as fellow-citizens in their homes, and they are presumed to have that common opinion of their equity which in the absence of enactment, and since some such laws are necessary, is both a sufficient, and the only possible, ground for their obligation: and this it is which is meant when these laws are said to accompany Englishmen as their birthright. They do not take with them the public department of law, even so far as its contents may affect property, because that department finds its expression in institutions such as those mentioned by Blackstone of revenue, police, and an established Church, which from the nature of the case cannot exist in any society where they have not been instituted. It cannot even be asserted as a universal proposition, that they take with them those laws which lay down the definition and punishment of crime. Nor again into a colony founded as here supposed can those laws be tacitly carried which, like those of bankruptcy, though essentially private, belong to the *justitia attributrix* and not to that *expletrix*, that is, dispose of interests, and not simply do right between party and party on the ground of property or obligation. Nor those which affect private rights from no motive of private justice, but from a reference to supposed public benefit, as in the case of the statute of charitable uses. For the community formed by the settlers does not in any manner continue or represent the person of the mother-country, so that, even were the circumstances the same, the same views of public policy should be attributed to it, in a way analogous to that in which the settlers continue the chain of the legal principles which are applicable to them as individuals."

All Souls' College, Oxford,
December, 1866.